No. 17-1011

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, et al.,
Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, ACCOUNTABILITY COUNSEL, CENTER FOR CONSTITUTIONAL RIGHTS, CENTRE FOR RESEARCH ON MULTINATIONAL CORPORATIONS, GLOBAL WITNESS, INCLUSIVE DEVELOPMENT INTERNATIONAL, INTERNATIONAL ACCOUNTABLITY PROJECT, ERICA R. GOULD, AND JENNIFER M. GREEN IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the International Organizations Immunities Act—which affords international organizations the "same immunity" from suit that foreign governments have, 22 U.S.C. § 288a(b)—confers the same immunity on such organizations as foreign governments have under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11.

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INTEREST OF *AMICI CURIAE*[1]

Since 1989, the **Center for International Environmental Law (CIEL)** has used the rule of law to protect the environment, promote human rights, and ensure a just and sustainable society. In fulfilling its mission to protect the environment and communities against the adverse impacts of development CIEL was instrumental in creating the Inspection Panel at the World Bank, as the first accountability mechanism within a development finance institution. In subsequent years CIEL has worked to strengthen safeguard policies and accountability mechanisms globally. CIEL provides assistance and accompaniment of people and communities who seek redress for harms caused by development projects by filing complaints at these mechanisms. Currently, CIEL supports communities from Colombia, Chile, Panama, and Nicaragua in their cases at independent accountability mechanisms, three of which are at the IFC's mechanism the

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of briefs from any *amicus curiae* on the merits of this case.

Compliance Advisor Ombudsman. CIEL's research and advocacy at international institutions is solidified with collaborations on reports such as GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE.

Accountability Counsel amplifies the voices of communities around the world to protect their human rights and environment. As advocates for people harmed by internationally financed projects, Accountability Counsel employs community driven and policy level strategies to access justice. For the past decade, Accountability Counsel has supported people in over 40 communities around the world in their complaints about the human rights and environmental abuses of international organizations. Among these are four complaints to the IFC's Compliance Advisor Ombudsman. Accountability Counsel's policy advocacy focuses on enhancing the policy and practice of non-judicial accountability mechanisms, with deep expertise in the CAO, and the IFC response to CAO cases. Through its research program, Accountability Counsel co-authored the joint report GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE and has documented the 1,300 complaints filed to non-judicial accountability mechanisms over the past 25 years, analyzing them for trends and best practice. Through Accountability Counsel's case support, policy

advocacy and research across these mechanisms, the organization has seen the CAO as a leader in delivering fair accountability processes in recent years, with repeated poor responses from the IFC that result in lack of remedy for complainants.

The Center for Constitutional Rights (CCR) is a non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Since its founding in 1966 out of the civil rights movement, CCR has a long history of litigating cases on behalf of those with the fewest protections and least access to legal resources. CCR brought the landmark case that, for the first time in the modern era, recognized claims under the Alien Tort Statute to remedy human rights violations, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), a decision ultimately endorsed by this Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and brought cases that recognized that the ATS applies to non-state actors, *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), *cert denied*, 518 U.S. 1005 (1996), and to corporations, *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *dismissed by stipulation pending reh'g en banc*, 403 F.3d 708 (9th Cir 2005), including U.S. corporations that comport with this Court's decisions in *Kiobel v Royal Dutch Petroleum Co.*, No. 10-1491, and *Jesner v.*

Arab Bank, No. 16-499. *See Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014); *Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08-cv-827, 2018 WL 3118183 (E.D. Va. June 25, 2018). CCR also filed the first *habeas corpus* petitions on behalf of foreign nationals detained by the Executive without counsel, charge or trial, at the U.S. Naval Station at Guantánamo Bay, Cuba—petitions that have twice reached this Court. See *Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene v. Bush*, 553 U.S. 723, 769 (2008). CCR regularly engages with various international human rights institutions and mechanisms, including the United Nations treaty review process, the Inter-American Commission on Human Rights, and various nation-states' universal jurisdiction statutes to advance accountability and right to a remedy for victims of international human rights violations.

The **Centre for Research on Multinational Corporations** (in Dutch, *Stichting Onderzoek Multinationale Ondernemingen* or SOMO) is a non-profit organization based in Amsterdam, The Netherlands. SOMO envisions a global economic, political and legal system in which civil society has the power to hold multinational corporations and governments to account for destructive and unfair business practices, and the power to realise economic alternatives, locally and globally. Since 1973, SOMO

has investigated multinational corporations and the impact of their activities on people and the environment. When workers or communities feel they have been adversely affected by corporate activity, we support them in accessing non-judicial grievance mechanisms, including the independent accountability mechanisms of development finance institutions. SOMO also led the joint research initiative that resulted in the 2016 publication of GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE, which found that development banks themselves undermine the effectiveness of their own complaint mechanisms by limiting their mandate and failing to uphold their own responsibilities in the complaint process.

Global Witness advocates to end environmental and human rights abuses driven by the exploitation of natural resources and corruption in the global political and economic system. We have been pioneers in uncovering and exposing the links between corruption, conflict and human rights and environmental abuses. We use our exposes to fight for genuine accountability for governments, companies and individuals, where they have been responsible for injustice. We believe that international organisations, including the International Finance Corporation, should be equally accountable for their actions.

Inclusive Development International (IDI) is a human rights organization working to make the international economic system more just and inclusive. We support and build the capacity of local organizations and affected communities to defend their land, environment and human rights in the face of harmful investment and development projects, including through both judicial remedies and non-judicial grievance mechanisms. Through research, casework and policy advocacy, IDI works to strengthen the human rights regulation and accountability of corporations, financial institutions and development agencies. IDI's policy research and advocacy focuses on improving environmental and human rights due diligence processes of private investors, financiers and multilateral development banks and on advancing the right to effective remedy when harms occur. IDI's research has highlighted widespread and systemic flaws in the IFC's approach to environmental and social due diligence and supervision in its financial sector investments, which make up over half of the institution's total portfolio. IDI also collaborated on the joint report GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE. Since 2012, IDI has advised and supported dozens of communities in Asia and Africa in complaints to the CAO against the IFC and its corporate clients.

For 13 years, **International Accountability Project** has supported communities adversely impacted by development projects to assert their human and environmental rights and to identify processes with the greatest impact to improve people's ability to shape their own development and provide remedies when rights are violated. International Accountability Project has advocated to create openings at influential decision-making spaces at international financial institutions, such as the World Bank Group, to advance development principles and projects that prioritize human and environmental rights. Pertinent to the instant matter, we have worked with communities adversely impacted by International Finance Corporation projects through various stages of the project cycle, assisting communities to: obtain critical project information that could impact their lives, improve the design of a project, and mitigate, or wholly avoid, environmental and human rights risks; document and amplify concerns about existing and future project harms; raise awareness of existing avenues for recourse; and provide technical and strategic support in complaint process before the Compliance Advisor Ombudsman.

Dr. **Erica R. Gould**, PhD, has substantial professional interest in the issues addressed in this brief, and these issues fall within her area of

expertise. Dr. Gould is the director of the International Relations Honors Program and a Lecturer in International Relations and International Policy Studies at Stanford University. She has previously served as an Assistant Professor at the University Virginia and a Visiting Assistant Professor at Johns Hopkins University. For over ten years, she has taught undergraduate and graduate-level courses on international organizations at the University of Virginia, Johns Hopkins University, and Stanford University. Dr. Gould is a political scientist and an expert on international organizations. In particular, she has studied international financial institutions extensively, and conducts research on mechanisms of control of international organizations. Her numerous publications include MONEY TALKS: THE INTERNATIONAL MONETARY FUND, CONDITIONALITY AND SUPPLEMENTARY FINANCIERS (2006). In addition to her research and teaching expertise, Dr. Gould also serves on the Board and Strategy Committee of Accountability Counsel, a San Francisco-based nonprofit organization. She submitted an amicus brief in support of the Petitioners in the United States Court of Appeals for the District of Columbia Circuit.

Jennifer M. Green is an Associate Professor at the University of Minnesota where she directs and teaches the Law School's Human Rights Litigation and International Legal Advocacy Clinic and a

seminar on Business and Human Rights. She has two decades of experience working on questions of accountability and remedies for alleged human rights violators both in the U.S. courts and in international fora such as international criminal tribunals, and the United Nations and Inter-American human rights systems. She was counsel for amicus Erica Gould in support of Petitioners in the United States Court of Appeals for the District of Columbia Circuit.

SUMMARY OF ARGUMENT

The International Organizations Immunities Act (IOIA) should be construed as conferring the same immunity that foreign governments have under the Foreign Sovereign Immunities Act (FSIA)—namely, a "restrictive theory" of sovereign immunity under which public international organizations are immune from suits relating to acts of a governmental nature, but not those relating to commercial activities. The very purpose of immunity is to aid an international organization in effectively pursuing and achieving its stated mission and objectives. Some international organizations expressly address the nature and scope of their immunity in their charters. For those that do not, the IOIA provides a set of default rules regarding immunity. These default rules should be interpreted and applied in a manner that advances

the work that international organizations do in their respective domains.

Specifically, applying a restrictive theory of immunity to the IOIA will increase the accountability of international organizations to the various nonstate persons and entities with whom they interact in their work. Independent accountability mechanisms (sometimes abbreviated IAMs) currently in place for international financial institutions (IFIs) like the International Finance Corporation (IFC), the Respondent, to address complaints and grievances have been criticized for failing to elicit an institutional response that offers most complainants an effective remedy. A restrictive theory of immunity would counter that criticism by ensuring that U.S. courts are accessible to provide redress, particularly for those parties adversely impacted by an international organization's commercial activities, stemming from, for example, environmental damage or human rights abuse. It would also enhance an international organization's reputation and public image by sending a message that the organization does not consider itself to be above the law.

Moreover, ensuring that the courts are accessible to parties who have been adversely impacted by an international organization's commercial activities would not open a floodgate of lawsuits that threaten

to disrupt the organization's operations, sap its resources, and derail its mission. First, there is no empirical evidence to support such a concern and, indeed, even the IFC has taken the opposite view at the petition stage. Second, and more importantly, even the Respondent's IAM, with a lower barrier-to-entry than the courts, has not experienced a "flood" of cases. Opening up an avenue of legal recourse with a higher barrier-to-entry—namely, the U.S. courts—to a subset of complainants with claims falling outside the scope of an international organization's immunity will not result in a flood either.

ARGUMENT

Amici agree with the Petitioners that, as a matter of statutory construction, the IOIA's grant to international organizations of "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments," 22 U.S.C. § 288a(b), should have the same scope as the immunity granted to foreign governments under the FSIA. The quoted statutory text demonstrates that the IOIA is a "general reference" statute, which incorporates any subsequent changes in the referenced body of law on foreign sovereign immunity, including the passage of the FSIA. 2B NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 51:7 (7th ed. Nov. 2017)

(distinguishing a specific reference statute that "refers specifically to a particular statute by its title or section number" and does not include subsequent amendments to the referenced statute, from a general reference statute that "refers to the law on a subject generally" and "includes subsequent amendments"); *Hassett v. Welch*, 303 U.S. 303, 314 & n.17 (1938) (applying the "reference" canon to a specific reference statute). And as the Court has held repeatedly, the FSIA's scope is one of restrictive immunity, not absolute immunity. *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

Amici write separately to point out that the application of a restrictive theory of immunity would assist international organizations in carrying out their stated missions and objectives. As recounted in Part I.A *infra*, the IFC and other IFIs have instituted IAMs that are intended to investigate and resolve complaints and grievances relating to their operations and activities. Practice and time, however, have exposed certain shortcomings associated with the institution's response to these mechanisms, and critics have pointed out that what's often lacking is an effective remedy. In the face of such criticism, applying the longstanding restrictive theory of immunity would give complainants access

to U.S. courts and a legitimate opportunity to obtain an effective remedy in cases where non-judicial accountability processes fail to yield a satisfactory resolution or any resolution at all.

Furthermore, applying a restrictive theory of immunity would not only complement an international organization's accountability mechanism but also enhance its reputation and improve its public image. As discussed in Part I.B *infra*, a claim of absolute immunity creates a negative impression among the public that the organization sees itself as above the law. That impression can breed mistrust and skepticism of the organization's operations and activities, thus making its mission more difficult—and runs contrary to principles of international law recognizing a right to a remedy. Applying a restrictive theory of immunity would help repair and restore an international organization's public image by sending a strong message that even an international organization may be held to answer in a court of law, particularly for claims and disputes arising out of its commercial activities.

Amici also write to allay concerns that the application of a restrictive theory of immunity will open a floodgate of litigation against international organizations, plaguing them with innumerable lawsuits that cripple their operations or prevent

them from carrying out their stated missions. *See Jam v. Int'l Fin. Corp.*, 860 F.3d 703, 708 (D.C. Cir. 2017), Pet. App. 11a ("Appellee's suggestion that the floodgates would be open does not seem an exaggeration."); *Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104, 110–11 (D.D.C. 2016), Pet. App. 34a (expressing a concern that a waiver of immunity would open "a floodgate of lawsuits by allegedly aggrieved complainants from all over the world" (quoting the IFC's reply brief on its motion to dismiss)). As pointed out in Part II.A *infra*, such concerns lack any empirical support. What's more, the IFC has expressed the opposite view at the petition stage.

In any event, such concerns, if warranted, should only incentivize international organizations to make their IAMs more robust and the institutions more responsive to the mechanisms' findings and recommendations. As addressed in Part II.B *infra*, international organizations can exert some measure of control over the number of complaints that end up in litigation. They can provide alternative processes for dispute resolution that involve third-party neutrals as opposed to judges. They may be able to craft alternative forms of relief that do not require judicial supervision or enforcement.

I. A RESTRICTIVE THEORY OF IMMUNITY WOULD ASSIST INTERNATIONAL ORGANIZATIONS IN CARRYING OUT THEIR MISSIONS AND OBJECTIVES.

A. Access to Courts Would Complement Independent Accountability Mechanisms by Ensuring That Complainants Can Obtain an Effective Remedy.

1. Since the end of the Second World War, international organizations have matured as public institutions and autonomous international actors, and proliferated in number to occupy a diverse set of domains, some of which traditionally were occupied by governments and others that were not. According to one scholar, the trend is one of "[i]nternational organizations ... increasingly taking over functions that were traditionally reserved to States. This assumption of functional statehood is incremental and spread over a variety of issues, such as treaty making, functional recognition of newcomers into the international community, public services, economic regulation, peace and security, lawmaking, adjudication, and protection of individuals." Christoph Schreuer, *The Changing Structure of International Organization*, 11 TRANSNAT'L LAW. 419, 421 (1998). Another scholar has remarked that "[i]nternational (i.e., intergovernmental) organizations have become

a staple of the international legal system. Their creation, maintenance, and support stem from the unrelenting realities of international interaction and interdependence and the realization that nation-states can achieve better value outcomes acting collectively rather than alone." William E. Holder, *Can International Organizations Be Controlled? Accountability and Responsibility*, 97 PROCEEDINGS OF THE ANNUAL MEETING (AM. SOC'Y OF INT'L L.) 231, 231 (2003).

Given the various state functions that international organizations have taken over, and the immense international reach and substantial political influence that they exert, their accountability to the communities and peoples that they are supposed to benefit has been a subject of continuing interest and concern. In particular, the IFC and other IFIs have received considerable attention and scrutiny regarding their accountability to parties adversely impacted by the projects they finance. *See, e.g.*, ROXANA ALTHOLZ & CHRIS SULLIVAN, ACCOUNTABILITY & INTERNATIONAL FINANCE INSTITUTIONS: COMMUNITY PERSPECTIVES ON THE WORLD BANK'S OFFICE OF THE COMPLIANCE ADVISOR OMBUDSMAN (Univ. Cal. Berkeley Sch. of Law, Int'l Human Rights Law Clinic, Mar. 2017), https://bit.ly/2mHGzjC; Kate Nancy Taylor, *Appraising the Role of the IFC and Its Independent*

Accountability Mechanism: Community Experiences in Haiti's Mining Sector, 17 SUSTAINABLE L. & DEV. POL'Y 12 (2017); CAITLIN DANIEL, KRISTEN GENOVESE, MARIETTE VAN HUIJSTEE & SARAH SINGH (EDS.), GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE (Amsterdam: SOMO, Jan. 2016), https://bit.ly/2vnPZ5A; Benjamin M. Saper, *The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective*, 44 N.Y.U. INT'L L. & POL. 1279 (2012); Alnoor Ebrahim & Steve Herz, *Accountability in Complex Organizations: World Bank Responses to Civil Society* (Harv. Bus. Sch. working paper, Oct. 2007), https://hbs.me/2MaillC; Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177 (2005).

The World Bank Group set up an Office of the Compliance Advisor Ombudsman (CAO) in 1999 in response to pressure about the lack of jurisdiction of its Inspection Panel. As constituted, the CAO receives complaints related to IFC and Multilateral Investment Guarantee Agency (MIGA) projects whereas the Inspection Panel receives complaints related only to the activities of the World Bank Group's public-sector institutions (i.e., the Interna-

tional Bank for Reconstruction and Development and the International Development Association). The CAO's first case addressed dissatisfaction among the Pehuenche people regarding their resettlement as a result of the Pangue Ralco Dam Project in Chile. *See* THE CAO AT 10: ANNUAL REPORT FY2010 AND REVIEW FY2000–10 18–19 (2010), https://bit.ly/2M7gXph.

Over nearly two decades, the CAO has thus provided a mechanism for parties to raise claims of harm to an independent entity designed to investigate and evaluate such claims, free of influence by the operational staff at the IFC. From its establishment 18 years ago to date, the CAO has registered only 178 complaints. CAO Cases, COMPLIANCE ADVISOR OMBUDSMAN, https://bit.ly/2vp3RfT (last visited July 31, 2018). According to Dr. Erica Gould, the number of projects for which complaints were registered with the CAO (155 in FY2001–15) is but a small fraction (less than 3%) of the total projects that the IFC financed during that same time period (5702). *See* Br. Amicus Curiae Dr. Erica R. Gould at 21–24, *Jam v. Int'l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017).

And importantly, in this case, litigation resulted only when the Petitioners concluded that the CAO process was ineffectual because the IFC was largely rejecting the CAO's findings and failing to take

corrective steps. When this avenue failed, litigation became the only option to restore the legitimacy of the institution's operations.

The Petitioners' experience with the CAO process accords with the findings of practitioners, including many of the *amici*, and scholars who have assessed how well the IFC is addressing CAO-registered complaints relating to its operations and activities. First, practitioners note that IAMs:

> make up only half of the accountability system.... The [IFI's] management also plays a critical role in the system by, inter alia, responding to the [mechanism's] findings, consulting with complainants ... on the development of an action plan to address instances of non-compliance, and applying lessons learned from cases to future projects. The system only functions if both halves of the [accountability framework] work and work well.

CAITLIN DANIEL ET AL., *supra*, at 17–18.

Second, the CAO, as currently constituted, lacks the power to hold the IFC accountable and to grant complainants an effective remedy. *See* Saper, *supra*, at 1325 ("The procedural measures [within the CAO]

alone, however, without some 'hard' force, are insufficient to allow project-affected people to hold the IFC/MIGA accountable[.]"); *see also* Daniel D. Bradlow, *Using a Shield as a Sword: Are International Organizations Abusing Their Immunity?*, 31 TEMPLE INT'L & COMP. L.J. 45, 67 (2017) ("[I]t is not assured that the [World Bank Group's accountability mechanisms] can provide the complainants with a meaningful remedy because they only have investigatory and/or advisory powers, and their findings and recommendations are nonbinding."); Carson Young, Note, *The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity Under the IOIA*, 95 TEX. L. REV. 889, 907 (2017) (noting that accountability mechanisms fail to produce enforceable judgments and therefore fail to guarantee any remedial or corrective measures).

Both a functional, non-judicial complaint-investigation/resolution framework and a restrictive theory of immunity under the IOIA that allows for some litigation should be cornerstone features of the accountability framework of international organizations, including the Respondent. They function not as alternatives, but as complements, and at times can serve distinct purposes. Independent accountability mechanisms of international organizations, including the CAO, provide an avenue for communities to

submit complaints and have them addressed through various means, including dispute resolution (a broad term that encompasses a variety of approaches that are frequently employed: facilitation an[illegible]ormation sharing, joint fact-finding, dialogue and negotiation, mediation and conciliation) and compliance. Affected individuals or communities may not choose to litigate if the CAO, in this instance, could provide a forum for addressing the dispute with less cost, shorter timeframes for resolution, and a lower barrier-to-entry. And these individuals or communities ultimately may have no reason to litigate against the Respondent if the CAO process results in the IFC effectively addressing their concerns.

Furthermore, there may be instances where, as here, the CAO is unable to ensure that the IFC effectively redresses the concerns raised by the individuals or communities. In such cases, a restrictive theory of immunity would help promote the Respondent's accountability and legitimacy. Certainly, the IFC's long-term interests are served by deterring environmental and social abuses, through both its independent accountability mechanism and potential litigation, so that the organization operates in a legitimate, law-abiding, and responsible way. *See* INT'L FIN. CORP., IFC THE FIRST SIX DECADES 91 (2d ed. Nov. 2016) (stressing that "the lessons from [the Pangue Ralco Dam

Project in Chile] and other projects proved invaluable, leading to improved environmental and social guidelines that became standard practice not just for IFC, but for the global commercial banking industry as a whole"), https://bit.ly/2OvLIpj; INT'L FIN. CORP., THE IFC WAY DEFINING OUR CULTURE BUILDING OUR BRAND 4 (2009) (reciting as a corporate value, *We do what we say we will do, and we hold ourselves accountable*), https://bit.ly/2LGqtU6.

Given the broad missions that they undertake and the many peoples and communities that they impact, international organizations should have every reason to address complaints and grievances relating to operations and activities through an internal system with an independent accountability mechanism like the CAO, and through the judicial system when necessary and appropriate, under a restrictive theory of immunity.

B. Access to Courts Would Also Enhance Reputation and Restore Public Image by Showing That International Organizations Are Not Above the Law.

A negative byproduct of absolute immunity is the development of a perception that international organizations, and the people who staff them, are above the law. *See, e.g.*, Greta L. Rios & Edward P.

Flaherty, *International Organization Reform or Impunity? Immunity Is the Problem*, 16 ILSA J. INT'L & COMP. L. 433, 454–55 (2010) ("Immunities may at first glance seem beneficial to the UN and other international organizations but may ultimately prove counterproductive. One should consider that the vast immunities of these organizations will give the impression that they can get away with abusing the very principles for which they were created to promote."); Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53, 88–89 (1995) (observing that "the price of fostering corporate identity within an enterprise favored with privileges and immunities may be that some staff members will develop an arrogant sense of being above all law").[2]

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[2] Such claims of absolute immunity run contrary to the fundamental principle of a right to a remedy enshrined in international law. *See, e.g.*, *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No.17, at 29 (Order of Sept. 13) ("[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

And when these organizations in fact ignore the public findings and recommendations of their independent accountability mechanisms, their reputation and public image sustain significant damage as a result. That only breeds mistrust and skepticism within affected communities about an organization's agenda and motives, which ultimately hinders or even jeopardizes its mission.

A restrictive theory of immunity would help restore an international organization's reputation and public image. Young, *supra*, at 907 (concluding that "the increased accountability that would flow from less immunity could potentially increase public approval of international organizations"). "Better public perception would clearly benefit organizational goals by providing increased influence, cooperation, and political support." *Id.* These observations squarely apply to the IFC, which has developed and touted a brand that has included the taglines, *Creating opportunity for people to escape poverty and improve their lives*, and *Creating opportunity where it's needed most.* IFC THE FIRST SIX DECADES, *supra*, at 17.

II. A Restrictive Theory of Immunity Will Not Open a Floodgate of Lawsuits Against International Organizations.

A. There Is No Empirical Support for This Concern, As Even the IFC Itself Has Acknowledged.

1. Both the district court and the court of appeals acknowledged a concern raised by the IFC that permitting the Petitioners' lawsuit to go forward "would potentially open a floodgate of lawsuits by allegedly aggrieved complainants from all over the world." Def.'s Reply at 10. *See* Pet. App. 34a (district court) ("Since this type of suit is aimed at IFC's internal decisionmaking process, the Court has little reason to doubt IFC's assessment of its concerns."); Pet. App. 11a (court of appeals) ("Should appellants' suit be permitted, every loan the IFC makes to fund projects in developing countries could be the subject of a suit in Washington. Appellee's suggestion that the floodgates would be open does not seem an exaggeration."). *Amici* are unaware of any empirical support for this concern, and none appears in the record.

Even under a restrictive theory of immunity, lawsuits against international organizations more than likely will be quite rare. Such lawsuits, depending on their nature and type, may have to

overcome several procedural and substantive hurdles, one of which almost certainly will be whether the action falls within the commercial-activity exception (or another stated exception) to sovereign immunity. *See* 28 U.S.C. § 1605(a) (2016). Case law has shown that employment-related disputes, for example, can meet with difficulty in satisfying the FSIA's commercial-activity exception. *See, e.g., Tuck v. Pan Am Health Org.*, 668 F.2d 547, 550 (D.C. Cir. 1981) (holding that the health organization's supervision of its personnel and provision/allocation of office space did not constitute commercial activity); *Broadbent v. Org. of American States*, 628 F.2d 27, 35–36 (D.C. Cir. 1980) (holding that employment disputes between an international organization and its internal administrative staff are noncommercial in nature, and hence outside the scope of the commercial-activity exception).

Additionally, potential plaintiffs like the Petitioners do not necessarily have access to a pool of legal and expert knowledge, awareness of available options, and financial resources needed to wage complex and expensive litigation. Additional hurdles to accessing the courts as would-be litigants include language and literacy barriers. Indeed, these barriers-to-entry exist even for non-judicial accountability mechanisms like the CAO, which as noted above, have not faced a flood of cases. CAO

Cases, COMPLIANCE ADVISOR OMBUDSMAN, http://www.cao-ombudsman.org/cases/default.aspx (last visited July 31, 2018); *see* CAITLIN DANIEL ET AL., *supra*, at 56–58 (discussing barriers to accessibility of non-judicial accountability mechanisms). Accordingly, there is no empirical basis to fear an opening floodgate of litigation from plaintiffs like the Petitioners. The Court should not give any credence to such a concern.

What's ironic about the Respondent's flood-of-litigation argument is that it seems to be worried about lawsuits from the very individuals and communities whom it is intended to benefit. As the IFC states, its mission is "to further economic development" and "fight poverty" around the world with the "intent to 'do no harm' to people and the environment." Pet. App. 3a, 24a; INT'L FIN. CORP., POLICY ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 2 (2012), http://bit.ly/2mJbbiR. Addressing concerns voiced by individuals and communities and redressing their harms, whether through the CAO or in the courts, will help the IFC fulfill its mission.

2. Although the IFC originally voiced a concern about opening a floodgate of litigation, it has since indicated that it isn't concerned that the application of a restrictive theory of immunity necessarily will

lead to more litigation. In opposing the Court's grant of a writ, the IFC flatly asserted that "[n]ot only are suits against international organizations *uncommon*, but also they frequently do not even involve the application of the IOIA. Further, in nearly all of them, the international organization would *enjoy immunity from suit even under the restrictive theory* adopted by the Third Circuit." Resp.'s Pet. Opp. Br. at 3 (emphases added). *See also id.* at 15 (asserting that "the suits brought against such organizations often would not fall within any of the FSIA's stated exceptions to immunity, even if the FSIA applied").

The IFC's current position couldn't be any clearer regarding the unlikelihood of increased lawsuits under a restrictive theory of immunity, and the Court should accept its statement as one more reason not to be concerned that a ruling for the Petitioners would open a floodgate of litigation. Of course, because the IFC didn't succeed in persuading the Court to deny certiorari, it presumably isn't judicially estopped from changing its view at the merits stage. *See New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001). But it would be exceedingly awkward and peculiar for the IFC to brush off lawsuits against international organizations as "uncommon" and assert confidently that it would be immune from suit "even under the restrictive theory," only then to turn around and

urge the opposite conclusion. The IFC should be held to account for any further flip-flopping.

B. Even If This Concern Were Legitimate, It Should Incentivize International Organizations to Make Accountability Mechanisms Stronger and Institutional Responses More Robust.

1. Assuming that the concern about a restrictive theory of immunity opening a floodgate of lawsuits is legitimate, international organizations can ameliorate that concern by revising their non-judicial accountability mechanisms so that the institutions respond to complaints and grievances more fully.

If IFIs want to avoid complaints ending up in the courts, then they can strengthen the power of their non-judicial, independent accountability mechanisms and the institutional responses to their findings. International organizations have various options at their disposal to investigate and resolve complaints and grievances without litigation. As was the case here, if an international organization is willing to address promptly and proactively the instances of noncompliance identified by its independent accountability mechanism, then litigation may not be necessary. *See* Pet. App. 27a–28a (recounting the fact that the IFC failed to respond to the CAO's compliance findings with an effective action plan).

2. Some commentators have argued that the IFC and other international organizations have a "duty to establish a dispute settlement mechanism to handle complaints of private parties" because they claim to enjoy absolute immunity from suit. Rutsel Silvestre J. Martha, *International Financial Institutions and Claims of Private Parties: Immunity Obliges*, *in* 3 THE WORLD BANK LEGAL REVIEW: INTERNATIONAL FINANCIAL INSTITUTIONS AND GLOBAL LEGAL GOVERNANCE 93, 131 (Hassane Cissé et al. eds., 2012). *Amici* submit that as long as international organizations are permitted to invoke absolute immunity to shield their actions, regardless of whether they are of a governmental or commercial nature, there likely will be little incentive on their part to ensure that accountability mechanisms and other measures provide relief to parties adversely affected by their activities. Knowing that complainants have no recourse in the courts, international organizations are likely to respond however they see fit, as the IFC did in this case, to the findings and recommendations of their respective IAMs, in this case the CAO. Accordingly, if the court of appeals' interpretation of the IOIA is allowed to stand, complainants will encounter even longer odds of receiving any kind of resolution or redress for the transgressions they have suffered.

By contrast, a restrictive theory of immunity will appropriately incentivize international organizations to ensure that their accountability mechanisms and related measures in fact provide effective remedies to adversely affected parties. If international organizations face the unappealing prospect of being haled into a U.S. court for noncompliant behavior, they will make reasonable efforts to resolve complaints and grievances before litigation becomes necessary. That will only redound to the benefit of the communities and peoples that these organizations are meant to help, and thus ultimately to the organizations themselves.

* * *

For the foregoing reasons, the application of a restrictive theory of immunity to the IOIA is unlikely to subject international organizations to more lawsuits than they currently face. If anything, they will be motivated to minimize the potential number of lawsuits by ensuring greater compliance with their own policies, procedures, and objectives, and providing effective relief in response to the findings of their independent accountability mechanisms.

CONCLUSION

The judgment of the Court of Appeals for the D.C. Circuit should be reversed.

Respectfully submitted,

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